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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES A. EGELHOFF,

Petitioner - Appellant,

v.

MIKE MAHONEY,

Respondent - Appellee.

No. 06-35888

D.C. No. CV-03-00135-JCL

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Jeremiah C. Lynch, Magistrate Judge, Presiding

Submitted September 24, 2007^{**}

Before: CANBY, TASHIMA, and RAWLINSON, Circuit Judges.

Montana state prisoner James A. Egelhoff appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Egelhoff contends that the Montana Supreme Court violated his due process rights by failing to decide on direct appeal whether sufficient evidence supported his conviction for the deliberate homicide of Roberta Pavola. Although Egelhoff failed to exhaust this claim in state court, “a federal court may deny an unexhausted petition on the merits . . . when it is perfectly clear that the applicant does not raise even a colorable federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005).

We conclude that Egelhoff fails to raise a colorable due process claim because he cannot demonstrate prejudice. *See United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993) (en banc) (due process claim requires showing of prejudice). In particular, Egelhoff’s claim on direct appeal that there was insufficient evidence to support his conviction for the deliberate homicide of Roberta Pavola lacks merit because, viewing the facts in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

To the extent that Egelhoff’s brief raises uncertified issues, we construe his arguments as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th

Cir. 1999) (per curiam).

AFFIRMED.